

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY**

**KEITH JANOWSKI,**

**Plaintiff,**

**v.**

**DIVISION OF STATE POLICE,  
DEPARTMENT OF SAFETY AND  
HOMELAND SECURITY, STATE  
OF DELAWARE,**

**Defendant.**

:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:

**C.A. No: 08C-03-037 (RBY)**

**Submitted: December 1, 2008**

**Decided: February 27, 2009**

***Upon Consideration of Defendant's Motion to Dismiss*  
GRANTED**

**OPINION AND ORDER**

Stephen J. Neuberger, Esq., The Neuberger Firm, Two East Seventh Street, Suite 302,  
Wilmington, Delaware 19801 for Plaintiff.

Patricia Murphy, Esq., Department of Justice, Wilmington, Delaware, for Defendants.

Young, J.



Plaintiff in this case is Lieutenant Colonel Keith Janowski (“Plaintiff”). Plaintiff alleges that he was wrongfully terminated by Division of State Police, Department of Safety and Homeland Security, State of Delaware (“Defendant”). Plaintiff’s argument is described below. Since no explicit waiver of sovereign immunity exists in relation to Plaintiff’s claims against Defendant, Defendant’s Motion to Dismiss will be **GRANTED**.

### ***I. Facts and Procedural History***

The undisputed relevant facts of this case are as follows. Plaintiff was employed by Defendant as a state trooper. Plaintiff was placed on probation in 2002, after pleading guilty to certain operating procedure violations occurring on July 16, 2002. These violations stemmed from an inadequate search of a suspect, which placed Plaintiff’s co-workers in danger as they dealt with the suspect.

Plaintiff received one year of probation for that incident. Approximately four months into the probation, Plaintiff was activated for military duty. Defendant tolled the probationary period while Plaintiff was on active duty. Therefore, when Plaintiff returned to work on November 5, 2003, he still had approximately eight months of his one-year probation remaining, pursuant to Defendant’s perspective.

On February 15, 2004, while on patrol, Plaintiff stopped a vehicle. He arrested the driver for driving under the influence. The passenger in that vehicle was taken to the police department by an assisting officer, where the passenger was to wait for a ride home. The assisting officer was aware that the passenger had not been searched. After the assisting officer left, Plaintiff searched the car. Plaintiff found



knives and a handgun under the passenger seat during this search. Plaintiff did not make the assisting officer, who had the passenger unrestrained with him, aware of this. When Plaintiff arrived back at the station, he alerted the sergeant on duty as to the weapons he found during the search. The passenger was then taken into custody, as the items were under the seat where he was sitting. At the station, Plaintiff searched the passenger, but found nothing of concern to him. The passenger was later searched by another officer. That officer found additional items on the passenger's person, including a bag of cocaine. After reviewing Plaintiff's inadequate search, the Division charged Plaintiff with violations of job performance standards.

Plaintiff elected to have a hearing in front of the Divisional Trial Board ("Trial Board"). The Trial Board hearing is an evidentiary hearing conducted pursuant to 11 *Del. C.* §9205. The Trial Board agreed unanimously to dismiss Plaintiff, stating that Plaintiff placed other troopers in danger for a second time, which was sufficient for termination, particularly considering Plaintiff's probationary status.

Plaintiff appealed to Secretary of Homeland Security and Safety, David B. Mitchell, as only the Secretary of Homeland Security and Safety can terminate an officer.<sup>1</sup> The Secretary affirmed the termination, finding that substantial evidence existed to support the Trial Board's findings. In the Secretary's written opinion, the tolling of Plaintiff's probation was not a violation of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)<sup>2</sup>, as probation was

---

<sup>1</sup> 29 *Del. C.* § 8203(6).

<sup>2</sup> 38 U.S.C. §§ 4301-4334 (1996).



neither a right nor a benefit of employment determined by seniority.<sup>3</sup> The Secretary's decision was issued on March 3, 2005. Plaintiff appeals with this lawsuit, filed with the Court on March 26, 2008.

## ***II. Standard of Review***

The motion before the Court is a motion to dismiss under Superior Court Civil Rule 12. Rule 12(b)(1) allows such a motion to assert the Court's lack of jurisdiction over the subject matter of the case.<sup>4</sup> Subject matter jurisdiction includes sovereign immunity cases.<sup>5</sup> If the Court finds that no claim can be asserted because of a lack of subject matter jurisdiction, dismissal is appropriate.<sup>6</sup>

## ***III. Discussion***

Defendant raises several grounds supporting this motion to dismiss. Defendant urges this Court to dismiss Plaintiff's complaint for purposes of subject matter jurisdiction, failure to state a claim, and *res judicata* to name just a few. Because Plaintiff's claims are defeated by a lack of subject matter jurisdiction, this opinion addresses only sovereign immunity(though determination on other grounds, including the basic policy findings, appear to be similarly sufficient to support Defendant's Motion).

---

<sup>3</sup> 38 U.S.C. § 4322(a).

<sup>4</sup> Super. Ct. Civ. R. 12(b)(1).

<sup>5</sup> *Mitchell v. State*, 2008 WL 3313064 at \*1 (Del. Super.).

<sup>6</sup> *Id.*



*Janowski v. Division of State Police, et al.*  
C.A. No.: 08C-03-037

Article 1, Section 9 of the Delaware Constitution states that “[s]uits may be brought against the State, according to such regulations as shall be made by law.”<sup>7</sup> Delaware courts have held that this creates immunity for the State and its agencies.<sup>8</sup> The Department of Safety and Homeland Security is a division of the State’s executive branch.<sup>9</sup> The Delaware State Police is an agency of Delaware.<sup>10</sup> Further, this immunity can be defeated only by the clear intent of the General Assembly.<sup>11</sup> It is an established principle under Delaware law that, while the General Assembly’s waiver of sovereign immunity does not have to be explicit, it does need to be clear.<sup>12</sup>

Plaintiff argues that the waiver of Defendant’s sovereign immunity is clear from the language of the statutes on which he relies. Plaintiff contends that 20 *Del. C. § 905* waives sovereign immunity on its face. Section 905 states:

(a) If any employer fails to comply with any provisions of federal or state law relating to employment rights of reservists or National Guard

---

<sup>7</sup> Del. Const. Art I, § 9.

<sup>8</sup> *Pauley v. Reinoehl*, 848 A.2d 569, 573 (Del. 2004); *Murphy v. Correctional Medical Services, Inc.*, 2005 WL 2155226 at \*2 (Del. Super.); *Marvel v. Prison Industries*, 884 A.2d 1065, 1069 (Del. Super. 2005).

<sup>9</sup> *In re Request of Governor for Advisory Opinion*, 722 A.2d 307, 310 (Del. 1998) (opinion stated that the Department of Public Safety was a part of the executive branch) (the Department of Public Safety is now called the Department of Safety and Homeland Security, 74 Del. Laws. ch. 110 (2003)).

<sup>10</sup> *In re Request of Governor for Advisory Opinion*, 722 A.2d at 310.

<sup>11</sup> Del Const. Art. 1, Section 9; *Doe v. Cates*, 499 A.2d 1175, 1176-77 (Del. 1985).

<sup>12</sup> *Pauley*, 848 A.2d at 574; *Turnbull v. Fink*, 668 A.2d 1370, 1377 (Del. 1995); *Jackson v. State*, 2000 WL 33115718 at \*1 (Del. Super.) (citing *Turnbull*).



members, the employee may elect to bring an action at law for damages for such noncompliance or such other relief as is appropriate in the Superior Court of Delaware.

(b) Any National Guard member who is called to state active duty shall be entitled to the same rights, privileges, and protections with respect to such member's employment as such member would have had if called for military training under federal law protecting reservists and National Guard members.<sup>13</sup>

Close inspection of Section 905, demonstrates no such waiver. The language closest to suggesting any intent to waive sovereign immunity would be the application of Section 905 to “any employer.” This does not suffice to support Plaintiff’s contention, however, as waivers of sovereign immunity upheld by Delaware courts require greater clarity and precision. For example, Delaware’s Whistleblowers Protection Act has a definitive waiver of that sort.<sup>14</sup> In *Tomei v. State*, the Court stated:

First, and most importantly, is the definition of employer. It includes “any department, agency ... *of the state*.” That language could not be clearer. The Act, of course, further defines employer to include the counties and municipal governments. The definition, including the State, alone operates as a waiver. The right to sue and by implication to be sued, also operates as a waiver of immunity.<sup>15</sup>

---

<sup>13</sup> 20 Del. C. § 905.

<sup>14</sup> 19 Del. C. §§ 1701-1708.

<sup>15</sup> *Tomei v. State*, 902 A.2d 757, 763 (Del. Super. 2006), (quoting 19 Del. C. § 1702 (emphasis added)).



*Janowski v. Division of State Police, et al.*  
C.A. No.: 08C-03-037

Delaware's Emergency Vehicle Statute (EVS) also explicitly waives sovereign immunity for the state's emergency vehicles:

(d) . . . The owner of such emergency vehicle may not assert the defense of governmental immunity in any action on account of any damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of such driver or owner.<sup>16</sup>

The EVS governs emergency vehicles that are owned by agencies of the state.<sup>17</sup> The Delaware Supreme Court in *Pauley v. Reinoehl* expanded the application of governmental immunity to include sovereign immunity when dealing with the EVS.<sup>18</sup> The Court, however, limited the application of the waiver to the insurance limits on the State's policy.<sup>19</sup> Sovereign immunity was waived only to the extent that the State Treasury was protected by insurance, strictly using sovereign immunity to prevent the State from paying on a plaintiff's claims.<sup>20</sup>

In *Yarnell v. Mendez*, the District Court of Delaware held that the defendants were entitled to summary judgment as Delaware had not consented to plaintiff's suit, or waived her sovereign immunity to such suit.<sup>21</sup> The court noted that a waiver of Eleventh Amendment sovereign immunity "must be in the form of an 'unequivocal

---

<sup>16</sup> 21 Del. C. § 4106(d).

<sup>17</sup> 21 Del. C. § 4106(e).

<sup>18</sup> *Pauley*, 848 A.2d at 572.

<sup>19</sup> *Id.* at 576.

<sup>20</sup> *Id.* at 574.

<sup>21</sup> *Yarnell v. Mendez*, 509 F. Supp. 2d 421, 429 (D. Del. 2007).



*Janowski v. Division of State Police, et al.*  
C.A. No.: 08C-03-037

indication that the State intends to consent to federal jurisdiction that would otherwise be barred by the Eleventh Amendment.”<sup>22</sup> It is notable that the defendant in *Yarnell* was the Delaware State Police.<sup>23</sup> This federal jurisdiction is of the type Plaintiff seeks to assert under USERRA.

When waiving sovereign immunity, the General Assembly has either placed the state’s insurance coverage in jeopardy by virtue of the statute<sup>24</sup>, or created political subdivisions with the right to sue and be sued.<sup>25</sup> The Delaware Supreme Court stated in *Wilmington Housing Authority v. Williamson* that the General Assembly, in granting the Authority the ability to sue and be sued, effectively waived its sovereign immunity protections.<sup>26</sup>

Considering the enabling statutes of the Department of Homeland Security and the Delaware State Police, the General Assembly does not give any appearance of an intent to waive sovereign immunity.<sup>27</sup> There are no provisions in those enabling statutes creating a right to sue and be sued relative to the Delaware State Police.<sup>28</sup>

Plaintiff also relies on 29 *Del. C.* § 5105. Section 5105 does not create a right

---

<sup>22</sup> *Id.* (quoting *Ospina v. Dept. of Corrections*, 749 F. Supp. 572, 578 (D. Del. 1990)).

<sup>23</sup> *Yarnell*, 509 F. Supp. 2d 421.

<sup>24</sup> *See Pauley*, 848 A.2d at 574.

<sup>25</sup> *See Wilmington Housing Authority v. Williamson*, 228 A.2d 782 (Del. 1967).

<sup>26</sup> *Id.* at 787.

<sup>27</sup> 11 *Del. C.* §§ 8301-8302; 29 *Del. C.* §§ 8201-8203, 8206.

<sup>28</sup> *Id.*



*Janowski v. Division of State Police, et al.*  
*C.A. No.: 08C-03-037*

to bring suit against the state. Nowhere in Section 5105 is there a waiver of the state's sovereign immunity, previously discussed. Section 5105 does outline the rights of service people to retain the benefits of their employment with the state upon returning from military service. It does not, however, waive the state's sovereign immunity.

No such language exists in any of the statutes Plaintiff uses to support his claims. While, arguably, the statutes create private rights of action, they do not waive the State's sovereign immunity protection in a clear manner. Furthermore, the statutes that Plaintiff relies upon do not address without reservation any preclusion of the State's reliance on its sovereign immunity protection.

#### ***IV. Conclusion***

Defendant's Motion to Dismiss is **GRANTED**. Defendant has not availed itself to suit, nor has the General Assembly created the necessary waiver of sovereign immunity. Therefore, Plaintiff has no cause of action against the Delaware State Police.

**SO ORDERED.**

/s/ Robert B. Young

J.

RBV/sal  
cc: Opinion Distribution  
File